

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

E&E ENTERPRISES GLOBAL, INC.,
101 Research Drive
Hampton, VA 23666

Plaintiff,

v.

DEFENSE COMMISSARY AGENCY,
1300 E. Avenue
Fort Lee, VA 23801-1800

Defendant.

C.A. No. _____

COMPLAINT

Plaintiff E&E Enterprises Global, Inc. ("E&E"), by and through undersigned counsel, for its Complaint against the Defense Commissary Agency ("DeCA") states as follows:

Nature of the Action

1. This action arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Department of Defense Regulations, 32 C.F.R. 286.25, to compel the production of records improperly withheld by DeCA as a result of its partial objection to E&E's FOIA request.

The Parties

2. E&E is an information technology (IT) and broadband solutions provider offering managed and unmanaged services to government and commercial customers, with a principal place of business at 101 Research Drive, Hampton, VA 23666.

3. DeCA is an agency of the Executive branch of the United States government, and has possession, custody and control of documents requested by E&E.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 32 C.F.R. § 286.25(b).

5. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 32 C.F.R. § 286.25(b).

Background

6. On August 22, 2008, the U.S. Small Business Administration (“SBA”) entered into Contract No. HC1013-08-D-0034 with the Defense Information Systems Agency (“DISA”) and the Defense Information Technology Contracting Organization (“DITCO”) to provide a DSL-VSAT communications system for DeCA in accordance with 15 U.S. Code § 637 (a)(1)(A) (the “Contract”).

7. Contract performance commenced immediately after award and continued until March 12, 2009, when E&E’s contract was terminated for the convenience of the government.

8. On May 19, 2011, E&E served DeCA with a FOIA request by email and first class mail. A true and correct copy of E&E’s FOIA request is attached hereto as **Exhibit 1**.

9. The FOIA request sought documents relating to the performance and termination of the Contract, including but not limited to the following categories of documents:

- a. documents relating to and communications regarding E&E’s performance of the Contract;
- b. documents and communications regarding the installation and/or testing of backhaul lines in connection with the Contract;

- c. communications directing and/or instructing that E&E commence installation and/or testing of backhaul lines in connection with the Contract;
- d. communications directing and/or instructing that E&E obtain backhaul carrier agreements for the Contract;
- e. documents and communications regarding directions and/or instructions that E&E commence installation of the Network Operation Centers for the Contract;
- f. documents and communications regarding changes requested by DeCA to the Very Small Aperture Terminal network architecture in connection with the Contract;
- g. documents generated, contributed to or maintained in connection with the termination of the Contract; and
- h. communications by and between DeCA and the SBA regarding the termination of the Contract.

10. On May 23, 2011, E&E received an email from Mr. Camillo R. DeSantis, a DeCA FOIA Officer, which acknowledged receipt of E&E's FOIA request and estimated the time and cost associated with the request. The email stated, among other things, that:

We estimate that the cost to search for responsive records will be approximately \$7,040.00. This estimate is based on approximately 160 hours of search and review time at the rate of 44.00 per hour. This estimate does not include the cost of reproducing documents since we have no way of estimating how many documents, if any, would need to be copied until the search is completed and this additional cost, if necessary, will be assessed upon delivery of the requested documents.

A true and correct copy of Mr. DeSantis' email is attached hereto as **Exhibit 2**.

11. As requested, E&E sent a check to DeCA in the amount of \$7,040.00 on June 7, 2011.

12. On July 29, 2011, E&E inquired regarding the status of its FOIA request, and was informed by Mr. DeSantis that “[r]eview of the documents with regard to their releasability continues.”

13. E&E was informed by Mr. DeSantis on August 1, 2011 that the review was being done “as quickly as possible” and that “most if not all of the information is releaseable.” Mr. DeSantis’ August 1, 2011 email further stated that:

we agree with the theory of open government and all FOIA requests are viewed from a “presumption of release” perspective. More simply, we view FOIA as a release statute and not a withholding one and therefore attempt to release as much as possible and only apply the exemptions when required.

A true and correct copy of the August 1, 2011 email is attached hereto as **Exhibit 3**.

14. E&E continued to inquire with Mr. DeSantis by telephone and email regarding the status of the FOIA request, and repeatedly was told that the review was ongoing.

15. On October 31, 2011, E&E emailed Mr. DeSantis, expressing concern that it was well “past the five months you indicated would be the likely maximum time necessary to complete DeCA’s response to the above FOIA request” and that “the extended period of time DeCA is taking to complete the response may indicate that the agency is causing the documents to be inappropriately excised, which would force us to commence the appeals process and further delay resolution of an already inappropriately--and grossly--extended period for consideration of its Termination for Convenience of the Government.”

16. In response to its October 31, 2011 email, E&E was informed by Mr. DeSantis on November 1, 2011 that “processing of your request continues and is nearing completion.”

17. It was not until November 29, 2011 – more than six months *after* it served its request – that E&E finally received a formal response to its FOIA request. DeCA's response consisted of 128 documents. The transmittal letter stated that "240 documents are being withheld in their entirety... under Title 5, U.S. Code, Section 552, Exemption b(5) which protects inter-agency or intra-agency material which would not be available by law to a party other than an agency in litigation with the Agency." A true and accurate copy of DeCA's letter transmitting its FOIA response is attached hereto as **Exhibit 4**.

18. In its letter, DeCA requested that E&E pay it an additional \$352.00, which brought the total cost of each document produced by DeCA on November 29, 2011 to an incredible \$57.75.

19. In a letter dated December 2, 2011, E&E questioned DeCA's rationale for partially denying its FOIA request. Among other things, E&E pointed out that DeCA failed to produce emails responsive to its request:

Your rationale for denying this information is risible in that, first, DeCA's production contains no e-mails, which amounts to an implicit and utterly implausible assertion that every piece of DeCA e-mail traffic relating to the contract in question is somehow an interagency or intra-agency communication whose substance falls within the deliberative process or attorney-client privileges. Second, both E&E's own files and the document production made by the Defense Information Technology Contracting Office ("DITCO") in response to our FOIA requests contain a number of e-mails from DeCA personnel to both DITCO and E&E relating to contract performance

20. On December 8, 2011, E&E sent by Federal Express, overnight delivery, its appeal of DeCA's partial denial of its FOIA request pursuant to "U.S. Code, Section 552, Exemption b(5) which protects inter-agency or intra-agency material which would not be available by law to a party other than an agency in litigation with the Agency." A true and correct copy of E&E's December 8, 2011 appeal is attached hereto as **Exhibit 5**.

21. DeCA received E&E's FOIA appeal on December 9, 2011.

22. Mr. DeSantis informed E&E on December 12, 2011 that DeCA would be providing E&E with hundreds of undisclosed e-mails which, purportedly due to a clerical error, were not included in the November 29 disclosure or mentioned in the transmittal letter. Mr. DeSantis promised that the emails would be produced within two weeks.

23. On December 22, 2011, Mr. DeSantis sent E&E a "CD containing 439 e-mails responsive to your Freedom of Information Act request (11-109)." The transmittal letter further stated "that additional e-mails will be forthcoming in the future." A true and correct copy of the December 22, 2011 letter is attached hereto as **Exhibit 6**.

24. On January 6, 2012, Mr. DeSantis represented that "another CD [would be] going out on Monday with another 400 or so with still more to follow." A true and correct copy of the January 6, 2012 email is attached hereto as **Exhibit 7**. However, E&E did not receive any documents by Monday.

25. Almost two weeks later, on January 19, 2012, E&E received another CD containing 402 emails.

26. On or about that same day, Mr. DeSantis confirmed that additional documents were going to be produced by DeCA. In addition, Mr. Desantis represented that DeCA was maintaining its partial objection to E&E's FOIA request pursuant to Exemption b(5).

27. To date, despite repeated inquiries, E&E has not received all of the promised documents responsive to its FOIA request.

28. Pursuant to 32 C.F.R. § 286.24, a "final determination" of E&E's appeal was required to be made by DeCA "within 20 working days after receipt." Accordingly, DeCA was required to respond to E&E's appeal by January 10, 2012.

29. DeCA failed to respond to E&E's appeal by January 10, 2012. Nor did DeCA ever notify E&E that it needed additional time to respond to the appeal.

30. DeCA's partial denial of E&E's FOIA request was arbitrary and capricious, and contrary to DeCA's "presumption of release" policy and the memoranda issued by President Barack Obama¹ and Attorney General Eric Holder², which emphasize that FOIA reflects a "profound national commitment to ensuring an open Government."

Requested Relief

31. WHEREFORE, E&E, by and through its undersigned counsel, respectfully requests that this Honorable Court enter judgment in favor of E&E and against DeCA and issue an Order

a. Declaring that DeCA has improperly and unlawfully withheld documents responsive to E&E's FOIA request pursuant to Title 5, U.S. Code, Section 552, Exemption b(5);

b. Directing DeCA to disclose and make available to E&E all documents responsive to E&E's FOIA request;

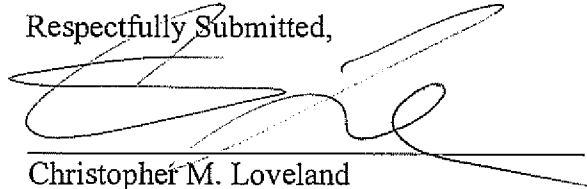
c. Awarding E&E its reasonable attorneys' fees and costs in bringing this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

¹ See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (January 21, 2009).

² See Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (March, 19, 2009).

d. Awarding E&E all such other relief as this Court deems just and proper.

Respectfully Submitted,



Christopher M. Loveland

(D.C. Bar No. 473969)

W. Bruce Shirk

(D.C. Bar No. 91520)

Sheppard Mullin Richter & Hampton LLP

1300 I Street, N.W., 11th Floor East

Washington, D.C. 20005-3314

Tel. (202) 218-0000

Fax (202) 312-9432

cloveland@sheppardmullin.com

bshirk@sheppardmullin.com

Dated: January 31, 2012

*Attorneys for Plaintiff E&E Enterprises
Global, Inc.*